DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

FEB 11 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 92-266**
	)	
Rate Regulation	)	

REPLY COMMENTS OF
VIACOM INTERNATIONAL INC.

VIACOM INTERNATIONAL INC.

Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
William B. Baker

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006
(202) 429-7000

February 11, 1993

No. of Copies rec'd 0+6
List A B C D E

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	**MM Docket No. 92-266**
Rate Regulation	

REPLY COMMENTS OF
VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom"), by its attorneys, hereby submits this reply to comments filed in response to the Commission's *Notice of Proposed Rulemaking* regarding cable rate regulation.

I. INTRODUCTION AND SUMMARY

Viacom, a diversified entertainment company which owns and operates video program services, cable systems and other entertainment-related businesses,[1] will be affected

[1] Showtime Networks Inc. ("SNI"), a wholly-owned subsidiary of Viacom, owns and operates the premium program services Showtime, The Movie Channel, and FLIX. MTV Networks ("MTVN"), a division of Viacom, owns and operates the advertiser-supported program services MTV: Music Television, VH-1/Video Hits One, and Nickelodeon (comprising the Nickelodeon and Nick At Nite programming blocks). Viacom also owns Showtime Satellite Networks Inc., which distributes SNI, MTVN and third-party program services to owners of home television receive-only earth stations nationwide. Through wholly-owned subsidiaries, Viacom also holds partnership interests in Comedy Central, Lifetime Television and All News Channel, advertiser-supported program services, and in Prime
(continued...)

substantially by the implementation of the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act" or "Act").[2]

In these reply comments, Viacom addresses certain proposals made in the opening comment round, including comments regarding the jurisdiction of the local regulatory authority, several aspects of the rate regulation proposals, and the proper treatment of promotional discounts.[3] In particular, Viacom submits that:

- The Cable Act requires local franchising authorities to certify to the Commission their legal authority to regulate rates and is not an independent source of regulatory power;
- The Cable Act does not abrogate pre-existing cable affiliation agreements and flow-through of programming costs is therefore required;
- While benchmarks are a preferable form of regulation, they need to be established on a per-

---

[1](...continued)
Sports Northwest, a regional sports service in the Seattle-Tacoma, Washington, area. Viacom Cable owns and operates cable systems serving approximately 1,000,000 subscribers.

[2] Pub. L. No. 102-385, 106 Stat. 1460.

[3] In filing these reply comments, Viacom does not waive any claim that the Cable Act or regulations that may be promulgated thereunder violate the First and Fifth Amendments to the United States Constitution. For example, it is well-established that cable operators have protected First Amendment rights (*see, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) and the Cable Act and its implementing regulations may directly impinge on those rights. *See also Comments of Viacom International Inc., MM Docket No. 92-264 (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions)*, at 2-4 (Feb. 9, 1993).

channel basis and allow for a flow-through of programming, system expansion, and all government-mandated costs;

- "Effective competition" should be defined to include all potential competitors not under the cable operator's control;
- The uniform rate structure provision of the Act does not prohibit the creation of reasonable classes of service or promotional discounts, or abolish the "competitive necessity" doctrine;
- Cable systems should not be required to provide billing and collection services for leased commercial access channels;
- A cable operator is not required to make subscription to the basic tier a precondition to the purchase of non-broadcast programming;
- Packages of premium program services that are also sold on an *a la carte* basis are not subject to rate regulation either as a package or as *a la carte* offerings; and
- A group of different multiplexed channels of the same program service is not subject to rate regulation.

II. THE CABLE ACT DOES NOT PROVIDE LOCAL FRANCHISING AUTHORITIES THE LEGAL POWER TO REGULATE CABLE RATES

Section 623(a)(3)(B) of the Cable Act requires a franchising authority to certify that it has the "legal authority to adopt, and the personnel to administer" cable rate regulations.[4] The *Notice* solicited comment regarding what a franchising authority must show in making this

---

[4] Cable Act at § 623(a)(3)(B).

certification.[5] In commenting on this issue, several filings contended that Section 623(a)(2)(A) of the Cable Act provides an independent source of rate regulatory authority.[6] Viacom submits that this view is incorrect.

Section 623(a)(2)(A) provides no independent authority to regulate basic tier rates.[7] First, by its terms the Cable Act merely establishes that systems not subject to effective competition shall be subject to regulation by either a franchising authority or this Commission; it is not an independent federal grant of rate regulatory authority. Second, a contrary reading would render Section 623(a)(3)(B) of the Act meaningless, for there would be no need to certify as to the franchising body's "legal authority" if the Cable Act conferred such authority automatically. Viacom submits that the better view is that the franchising authority must base its claim of legal authority on an independent source in either state or local law.

---

[5] *See Notice*, ¶ 29.

[6] *E.g., Comments of the National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties* at 28-30 (Jan. 27, 1993) ("*NATOA Comments*").

[7] *See NATOA Comments* at 30.

III. THE CABLE ACT DOES NOT ABROGATE EXISTING CABLE AFFILIATION AGREEMENTS AND FLOW-THROUGH OF PROGRAMMING COSTS IS THEREFORE REQUIRED

Several cable operators contend in their comments[8] that Congress' desire to maintain relatively low rates for basic service tiers cannot be reconciled with local and state governments being allowed to force cable operators to create large basic service tiers that include video programming beyond those channels specified at Section 623(b)(7)(A) of the Cable Act.[9] They therefore argue that the Cable Act implicitly abrogates inconsistent franchising agreements, and urge the Commission to preempt local franchise provisions that dictate carriage of program services on basic tiers.

Viacom notes that these commenters do not discuss the possibility that, for similar reasons, the Cable Act may be inconsistent with cable affiliation agreements. Viacom submits that the Cable Act does *not* abrogate cable affiliation agreements. Indeed, the legislative history makes clear that Congress removed from the 1992 Cable Act provisions contained in previous legislative proposals that had sought to preempt existing affiliation agreements between

---

[8] *See Comments of Newhouse Broadcasting Corporation* at 4 (Jan. 27, 1993); *Comments of Time Warner Entertainment Company, L.P.* at 13 (Jan. 27, 1993).

[9] Cable Act at § 623(b)(7)(A).

cable operators and program services.[10] The absence of an express preemption provision strongly suggests that Congress intended not to preempt existing franchise[11] or affiliation agreements.

Furthermore, as Viacom explained in its comments in the broadcast signal carriage phase of this proceeding, it is well-established that the abrogation of contracts by legislative action is not implied lightly, and that such interpretations are to be avoided where possible.[12] In those comments, Viacom explained that courts disfavor retroactive

---

[10] In particular, the 1990 Senate bill (S.1880, 101st Cong., 2d. Sess., § 623(b)(3)) explicitly preempted any law or franchise agreement that would have restricted the ability of cable operators to add to or delete from the basic tier any video programming other than retransmitted local television broadcast signals. The House version of the bill preempted provisions of both franchise agreements and cable affiliation contracts. *See* H.R. 5267, 101st Cong., 2d Sess., § 623(b)(4) (1990).

Although the 1991 House version of the bill (H.R. 1303) retained the preemption language from H.R. 5267, the 1991 Senate version (S.12) as introduced preempted only inconsistent obligations imposed by law. The 1992 House version, which was substituted for H.R. 1303, eliminated the preemption of franchise obligations and affiliation agreements altogether. *See* H.R. 4850, 102d Cong., 2d Sess., § 623(b)(2)(B). The House-Senate Conference Committee adopted substantially this same language into the final version of the Act.

[11] The scope of programming requirements in franchise agreements, however, continues to be limited by the provisions of Sections 624(b) and (c).

[12] *See Comments of Viacom International Inc., MM Docket No. 92-259 (Broadcast Signal Carriage Issues)* at 7-20 (Jan. 4, 1993).

application of federal statutes without an express legislative directive. *See, e.g., Bowen v. Georgetown Hospital*, 488 U.S. 204, 208 (1988), *General Motors Corp. v. Romein*, ___ U.S. ___, 112 S.Ct. 1195 (1992), and *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980).

Because abrogation is not lightly presumed, and in fact is contrary to the legislative history, the Cable Act does not preempt affiliation contracts. Consequently, and in addition to the other reasons for permitting a flow-through of programming discussed below, it is important for the Commission's rate regulatory scheme to account for cable operators' existing contractual programming obligations with respect to carriage and/or channel positioning of cable or other programming. The Commission's rate regulations must therefore allow cable operators to pass-through the costs of such programming.[13]

Alternatively, if the Commission were to permit abrogation of affiliation agreements at all, then as suggested by a number of commenters, it *must also* permit abrogation of franchise agreements at the discretion of the cable operator. There is no statutory basis whatsoever for

---

[13] While cost-of-service regulation would, by its nature, also accommodate this concern, Viacom agrees with the large majority of commenters that cost-of-service regulation should be avoided where possible.

conferring franchise agreements with a greater sanctity than private agreements between networks and operators. Indeed, any such grant of preferred status to contracts of franchise authorities as opposed to contracts of private parties presents a serious constitutional question.[14] Moreover, the interests of cable operators in their affiliation agreements is no less legitimate than their interests in franchise agreements.

IV. THE COMMISSION SHOULD ADOPT RATE REGULATIONS THAT PRESERVE THE ABILITY OF THE CABLE INDUSTRY TO IMPROVE SERVICES AND MEET CONSUMER DEMANDS

Any rate regulation method adopted must not hamper the continued growth of the cable industry and should also provide the flexibility necessary for it to meet consumer needs. Viacom urges the Commission to preserve financial incentives and favor flexibility in fashioning its rate regulation regime. Viacom believes such incentives and flexibility are entirely consistent with the Commission's task of assuring both "reasonable" and "not unreasonable" rates.[15]

---

[14] *See Comments of Viacom International Inc., MM Docket No. 92-259 (Broadcast Signal Carriage Issues)* at 12-13 (Jan. 4, 1993).

[15] Contrary to the position of the Consumer Federation of America (*see CFA Comments* at 82 (Jan. 27, 1993), there is a difference between a "reasonable rate" -- the statutory goal for basic tier rates -- and "not unreasonable" rates -- (continued...)

A. Benchmarks Should Be Established On A Per-Channel Basis

Viacom agrees with those commenters recommending that any form of benchmark regulation not contain a "cap," but employ per-channel benchmarks.[16] Placing a cap on rates would deter system operators from placing more costly program services on the basic tier and, over time, simply encourage the migration of more costly program services to non-basic tiers.

This result would be contrary to Congress's intent in the Cable Act to give cable operators the discretion to add non-broadcast program services to the basic tier.[17] Furthermore, the Commission has recognized that its implementation of the rate regulation provisions should not unduly restrict "the ability of cable operators to provide a full range of services on either the basic or higher level

---

[15](...continued)
the goal for cable programming tiers. In setting reasonable rates, the rate regulator applies the statutory factors in an effort to determine a particular rate. In contrast, determining whether a rate is "not unreasonable" presents a different inquiry. In that instance, the question becomes whether a rate falls within a broad zone of reasonableness, not whether it is the optimal rate that might have been set under a "reasonable rate" test.

[16] *See, e.g., Comments of Nashoba Communications Limited Partnership*, at 51 (Jan. 27, 1993).

[17] *See* Cable Act at § 623(b)(7)(B).

service tiers."[18] Per channel benchmarks would alleviate this problem by allowing the overall basic rate to rise if more program services are added.

B. The Commission Should Allow Operators To Flow-Through Increases In Programming Costs, Costs of System Improvements, and Costs Mandated By Government

The comments reflect widespread support for benchmark regulation as a means for assuring reasonable rates. Viacom concurs with these comments. Viacom further urges the Commission not to apply a "price cap" regulatory scheme to monitor increases in benchmarked rates. The Commission has neither sufficient experience in cable regulation nor suitable data on which to base a productivity factor for cable. Therefore, the type of price cap formula applied in the telephone industry cannot be applied with any degree of certainty to cable operators.

At the same time, many commenters recognize that benchmark regulation inherently contains an economic disincentive to technical innovation, expansion of channel capacity, and diversity of programming -- that as rates approach the benchmark, the regulated entity will not choose

---

[18] *Notice* at ¶ 5.

to incur increased costs that it cannot recoup.[19] Viacom agrees with many commenters that the cure for this disincentive is to permit cable operators to flow-through all costs for programming and capital improvements.[20] For similar reasons, the Commission should not create, in any form of benchmark regulation, economic disincentives for the introduction of new technologies. Thus, the rules also should allow for the flow-through of costs of capital improvements and technical experimentation.

Viacom further submits that the Commission should allow operators to pass-through all cable-specific costs mandated by government authorities. This pass-through includes not only those costs that are expressly cable-specific, but also costs that are applied to cable operators or subscribers in a discriminatory manner, including those which discriminate between cable and other communications and telecommunications media. For example, this means, in effect, that the Commission should deem costs mandated by the franchising authority as reasonable *per se*. This is appropriate because it is the governmental agency that represents the public

---

[19] *E.g., Comments of E! Entertainment Television, Inc.* at 4 (Jan. 27, 1993); *Comments of the National Association of Broadcasters, Appendix A* at 9-10 (Jan. 27, 1993).

[20] *See, e.g., Comments of ESPN, Inc.* at 6-9 (Jan. 27, 1993); *Comments of Arts & Entertainment Network* at 10-12 (Jan. 27, 1993); *Comments of the Motion Picture Association of America, Inc.* at 1-4 (Jan. 27, 1993).

interest at the franchising level which has found the costs in question to be appropriate and required.

C. "Effective Competition" Should Be Defined To Include All Potential Competitors Not Under The Cable Operator's Control

Viacom urges the Commission to limit its regulatory role only to those areas where it is required. Accordingly, Viacom recommends that the FCC define "effective competition" so as to minimize regulatory constraints on the ability of cable systems to respond to competitors. Consistent with this approach, Viacom is concerned by some comments which would have the Commission define "effective competition" in an unrealistically narrow manner.

The Cable Act establishes three tests for "effective competition." Under the second test, "effective competition" exists if the franchise area is served by "at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area" and at least 15 percent of the households in the franchise areas subscribe to such services.[21] The *Notice* solicited comment regarding the interpretation of the terms "offers" and "multichannel video programming distributor" for purposes of this test.[22]

---

[21] Cable Act at § 623(l)(1)(B).

[22] *Notice*, ¶¶ 7-9.

In response to the *Notice*, it was suggested that, in order to satisfy the 50 percent component, the term "offers" should not only mean that the competing distributor is technologically able to provide service, but that the distributor also must be "actually marketing" the service as well.[23] While this suggestion may sound reasonable, the commenter employs a far too stringent a test and ignores the effect on prices that the *threat* of competitive entry has.[24]

In Viacom's view, if, for example, a Direct Broadcast Satellite distribution system is available to consumers in a given market, it should be considered an "effective competitor" because it would, in fact, be constraining the behavior of the incumbent cable system operator.[25]

In addition, Viacom submits that a video dialtone joint venture involving a local telephone company and a cable operator should constitute a "multichannel video programming distributor" for purposes of measuring "effective

---

[23] *See NATOA Comments* at 15-16.

[24] *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). *See also The Department of Justice 1992 Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104.

[25] In a functioning DBS system, the signal is already being transmitted to every household within the satellite's footprint. It is only a simple step to make any household within the footprint a DBS subscriber, as the signal is already available. In this situation, no one could argue that the DBS system would not constrain the behavior of the incumbent cable system. *Accord Comments of Comcast* at 9-12 (Jan. 27, 1993).

competition." Two scenarios are possible. The first is that a cable operator could enter into a joint venture with a telephone company *outside* of the cable operator's franchise area. In this situation, there would be no reason not to consider that joint venture in determining whether "effective competition" exists in the franchise area where the video dialtone venture provides service.

The second possibility involves the situation where a cable operator enters a joint venture with a telephone company to provide video dialtone service in the cable operator's own franchise area. In this context, whether a cable operator's involvement controls the video dialtone service and thus negates the presumption of "effective competition" is a matter of fact and should be resolved on a case-by-case basis. Precluding such ventures *per se* from the scope of "effective competition" would unnecessarily discourage cable operators from developing or participating in video dialtone experiments and thereby foreclose the public from new businesses.

D. Under The Cable Act, Uniform Rate Structures Permit Reasonable Classifications And Responses To Competition

Viacom agrees with many commenters that the "uniform rate structure" provision of the Cable Act does not preclude cable operators from establishing reasonable classes or

categories of service with different rates and terms of service.[26] Thus, the Commission's tentative conclusion that the statute allows cable operators to establish "reasonable categories of service with separate rates and terms and conditions of service" should be adopted.[27]

For example, the record shows that separate classifications are appropriate in the context of multiple dwelling units ("MDUs"). It is frequently the case that cable operators and others are forced to negotiate competitively with landlords for rights (exclusive or otherwise) to serve an MDU. In these situations, landlords purchase service in bulk from the winning provider -- either the cable operator or a competing multichannel video distributor. Therefore, under certain circumstances MDUs could constitute separate classifications.[28] Interpreting the statute's geographic uniformity requirement to preclude the creation of reasonable classifications for such situations would, as a practical matter, seriously impede the cable operator's ability to compete for access to MDUs, or to

---

[26] *See Comments of the National Cable Television Association* at 77-79 (Jan. 27, 1993); *NATOA Comments* at 80.

[27] *Notice* at ¶ 113.

[28] Other examples of appropriate separate classifications would be commercial accounts (such as hospitals and nursing homes) and premium services or tiers offered without a buy-through of the basic service tier. *See infra* Section V(A).

compete for subscribers within an MDU which is also served by a competing multichannel video distributor. This in turn would have a deleterious effect on the cable system's rates to the public.

Similarly, the statutory requirement for uniform rate structures should not be applied so as to prevent cable operators from relying upon the "competitive necessity" doctrine to meet competition. Cable operators need the pricing flexibility to respond to attempts by rivals to engage in cream-skimming low-cost and high revenue areas, a practice that would tend to drive up rates paid by other customers. To the extent that the competitive necessity doctrine allows cable operators to respond to rivals' price reductions in order to prevent cream-skimming and retain the customer base over which fixed costs are spread, all cable subscribers benefit. Therefore, cable operators should be able to invoke the Commission's long-established "competitive necessity" doctrine to meet competitive challenges.[29]

As a final example, cable operators frequently provide installation as well as cable services under promotional arrangements at prices that are lower than the standard rates. The comments reflect general agreement that

---

[29] *See Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C.2d 923, 948 (1984). Of course, the competitive necessity doctrine would not tolerate predatory pricing by the incumbent cable operator.

promotional discounts to increase subscribership are desirable and benefit all subscribers. The Commission should not interpret the geographic uniformity requirement to preclude such promotional discounts.

E. Cable Operators Should Not Be Required To Provide Billing and Collection Services for Leased Access Channels

Some commenters urge that cable system operators must provide billing and collection services for leased access channels.[30] The Commission should not adopt this proposal. The Cable Act itself does not require cable operators to provide billing and collection services for leased commercial access. Likewise, the Commission should not interpret the Act so as to require cable operators to engage in billing and collection services if they choose not to do so.

Viacom currently contracts with providers like CableData to produce customer bills, maintain customer databases, send delinquency notices, and provide similar services. There are a wide variety of such billing services in the market, as well as a myriad of collection agencies. Therefore, commercial leased access channel providers have many means available to them for their billing and collections needs,

---

[30] *E.g., Comments of Fox, Inc.* at 4 (Jan. 27, 1993) (the FCC "must mandate that cable operators provide billing and collection and must set a maximum allowable percentage of its collections . . . that the operator is entitled to charge for its trouble").

and cable operators should not be compelled to provide this service.

Furthermore, requiring cable operators to do so would be unfair. The rates lessees of commercial access channels charge to cable subscribers are, as far as Viacom is aware, unregulated. Cable operators also have little control over the quality or content of such programming. Cable operators providing billing and other services could erroneously be blamed for the excessive rates and poor service of the commercial leased access user, resulting in damage to the operator's customer relations. A cable operator should not be placed in such a position involuntarily.

However, Viacom supports the proposal in the *Notice* that, in the event that a cable operator *chooses* to provide billing and collection, a reasonable rate for that service would include the recovery of all of its costs of doing so, including administrative costs and a reasonable profit.[31] Expressing a ceiling on the permissible charge as a percentage of actual collections for the leased access service, as Fox suggests, would be arbitrary and would not assure that cable operators would fully recover their costs of providing the service.[32] In addition, this would

---

[31] *Notice* at ¶¶ 146-150.

[32] *See Fox Comments* at 4.

improperly force the cable operator to share the risk of the leased access provider's uncollectibles.

F. Cable Rate Regulation Should Be Phased In To Allow Cable Operators Time To Adjust To The New Requirements

Cable rate regulation will foster significant changes to the industry operations, and require cable operators to implement many changes in a short period of time. As NCTA points out in its comments, many of these changes will relate to the placement of channels and reconfiguration of tiers.[33]

Viacom supports NCTA's recommendation that the rate regulations should take effect only after a sufficient transition period that allows cable operators an adequate opportunity to reconfigure and reprice their services. Due to the linkage between rate regulation and the issues affecting the carriage of broadcast stations, Viacom urges the Commission to delay the effective date of its cable rate regulations until the date that the must-carry/retransmission consent rules take effect.

---

[33] *See Comments of the National Cable Television Association* at 84-87 (Jan. 27, 1993).

V. THE CABLE ACT DOES NOT ESTABLISH A BASIC TIER "BUY-THROUGH" OF ANY KIND; PACKAGES OF PREMIUM PROGRAM SERVICES ALSO AVAILABLE ON AN *A LA CARTE* BASIS ARE NOT SUBJECT TO SECTION 623(b)(7)(A) AND ARE NOT SUBJECT TO RATE REGULATION

Viacom disagrees with those commenters that believe the Cable Act prohibits a cable operator from offering non-broadcast program services to a subscriber who does not subscribe to the basic service tier. Viacom also disagrees with those commenters that contend that packages of premium program services which are also made available in a given cable system on a per-channel basis are subject at all to the requirements of Section 623(b)(7)(A) or rate regulation.

A. The Cable Act Does Not Require Cable Operators To Compel Subscribers To Purchase Basic Tier Service As A Precondition To Purchasing Any Other Program Service

The *Notice* states that the Act defines the "basic tier" as a tier "to which subscription is required for access to any other tier of service."[34] It asks whether this language establishes a "basic tier buy-through" requirement and thereby precludes the offering of premium program services completely *a la carte* without prior subscription to the basic service tier. The *Notice* and a number of commenters apparently assume that this language, at a minimum, prohibits an operator from selling any "tier" of service without

---

[34] *Notice* at ¶ 12, *quoting* Cable Act, § 623(b)(7)(A).

requiring that a customer also purchase the basic service tier.

Viacom does not agree that there is any statutory requirement *at all* for a forced basic service tier buy-through of any kind. As a policy matter, such a requirement would be manifestly anti-consumer. A consumer who chooses to obtain over-the-air broadcasting by conventional means, or simply does not want to receive such signals in his home, but nevertheless wishes to view cable programming of particular interest, should be permitted to do so. Otherwise, the consumer would be forced to purchase program services that he does not want to buy.

Furthermore, and more fundamentally, Viacom believes that as a matter of statutory interpretation there is no legislatively-mandated buy-through requirement under the Cable Act at all. While the *Notice* characterizes it as such, Section 623 (b)(7)(A) of the Act is not a definition section and, while that provision describes the *minimum* elements of the basic service tier, it does not purport to define what constitutes the basic service tier in the manner suggested by the *Notice*.[35] The term "basic service tier" is, in fact, not defined anywhere in the Act. The closest provisions to any definition appear in two subsections of Section 602. Section 602(3) defines "basic cable service" as any service tier

---

[35] *See* Cable Act at §§ 623(b)(7)(A) & (8)(A).

which includes retransmission of local television broadcast signals, and Section 602(16) defines "service tier" as a category of cable service provided by a cable operator and for which a separate rate is charged. It is noteworthy that neither definition contains the concept of a "forced buy" which is presumed in the *Notice*.

Viacom submits that, if Congress had intended to define "basic service tier" to include the *Notice's* concept of a "forced buy," it would not have done so in an offhanded manner in a section of the Cable Act which identifies the minimal program services to be included in the basic service tier. Indeed, except for the single phrase in Section 623(b)(7)(A) giving rise to the interpretation that consumers *must always* subscribe to the basic tier, nothing in the Act indicates any such intent on the part of Congress. Surely Congress would not have legislated an issue of this magnitude in such a subtle and indirect manner.

The word "required" as used in Section 623(b)(7)(A) refers to a requirement that may be imposed by the cable operator -- and not the statute -- to compel purchase of the basic service tier. The Section merely recognizes that cable operators are free, but not compelled, to require subscription to the basic service tier prior to allowing access to any other tier of service. This interpretation is supported by reading Section 623(b)(7)(A) in conjunction with